REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 176 of 2003

(From original conviction and sentence of the Senior Principal Magistrate's Court at Nyahururu in Criminal Case No. 523 of 2002 – K. Ngomo [P.M.]

NTELEJO LOKWAM……APPELLANT

VERSUS

REPUBLIC……...……RESPONDENT

JUDGMENT OF THE COURT

The appellant, Ntelejo Lokwam was charged with six counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the offences were that on the 6th of March, 1999 at Jennings Farm, Laikipia District, the appellant jointly with others not before court and while armed with dangerous weapons, namely rifles and rungus robbed Terere Limuli, Daniel Murefu Kipsugut, Eunice Cheruto Kipsugut, Richard Kihoro, Stephen Njuguna Ndungu and James Kimaita Mwangi (*hereinafter referred to as complainants*) of cash and other personal effects and at or immediately before or immediately after the time of such robbery, used actual violence to the said complainants and in fact shot dead Daniel Murefu Kipsugut. The appellant pleaded not guilty to the charges. After a full trial, the appellant was convicted of the 1st, 2nd, 3rd and 5th counts but was acquitted on the 4th and 6th counts. He was sentenced to death as is mandatorily provided by the law. The appellant was aggrieved by his conviction and sentence and has appealed to this court.

In his petition of appeal, the appellant raised several grounds of appeal challenging his conviction by the trial magistrate. The said grounds of appeal may be summarized as follows; the appellant was aggrieved that he had been convicted based on the sole evidence of identification made under uncertain circumstances. He was aggrieved that he had been convicted based on insufficient and uncorroborated evidence of the prosecution witnesses. He was aggrieved that he had been convicted based on the evidence of an identification parade which was improperly conducted. He finally faulted the trial magistrate for convicting him based on the incredible testimony of the prosecution witnesses.

At the hearing of the appeal the appellant, with the leave of the court, presented to the court written submissions in support of his appeal. He further made an oral response to the submissions made by Mr. Koech on behalf of the State. He urged this court to find that the evidence adduced against him by the prosecution witnesses had not established his guilt to the required standard of proof. Mr. Koech on the other hand urged this court to uphold the conviction and the sentence imposed upon the appellant. He submitted that the evidence of identification that was adduced by the prosecution witnesses was water tight and had established the guilt of the appellant to the required standard of proof. We shall revert back to the submissions made after briefly setting out the facts of this case.

On the 6th of March, 1999 at about 4.00 p.m., as PW1 Terere Limuli was riding his bicycle towards the Rumuruti Township, he was accosted by a gang of about eight men who robbed him of his bicycle and the sum of Ksh.10,020/= which was in his possession. He testified that the gang of robbers was armed with guns and in the course of the robbery they assaulted him and seriously injured him to the extent that he lost consciousness. When he regained consciousness, he reported the robbery incident to Rumuruti Police Station. He testified that he was able to identify one of the robbers although he had not seen the said robbers before the robbery incident. When he was called to attend a police identification parade on the 22nd of February, 2002, about three years after the incident, he pointed out the appellant as being among the persons who robbed and injured him. He testified that the robbery took place for between 7-10 minutes. There is no evidence however, that PW1 described the robbers when he made the first report to the police.

PW2 Eunice cheruto Sugut, PW3 Stephen Njuguna Ndungu and PW4 Beatrice Chepkemoi narrated how on the 6th March, 1999 at about 7.00 p.m., they were attacked by a gang of robbers as they were traveling to Supili area in motor vehicle registration No. KZD 499. They testified that the said motor vehicle was being driven by Daniel Murefu Kipsugut (*hereinafter referred to as the deceased*) the husband of PW2. They testified that while the deceased was driving the said motor vehicle, he was shot and fatally injured. The motor vehicle came to a stop after which a gang of between four and five men emerged from the bush and robbed them of cash and personal belongings.

In the course of the robbery, the said robbers threatened to shoot them with a gun and in some instances assaulted them when they were reluctant to surrender the money which was in their possession. PW2 and PW4 testified that they were able to identify the appellant as being among the gang of robbers. They however did not state how they were able to identify the appellant even though they conceded that they had seen the appellant for the first time during the time of the robbery. PW2 and PW4 also testified that at the time there was sufficient light which enabled them to identify the appellant. They however did not give descriptions of the robbers when they made the first report to the police. They pointed out the appellant in an identification parade which was conducted on the 22nd of February, 2002 by PW8 CIP Cheruto Githinji.

PW6 AP CPL John Kamau testified that on the 7th of February, 2002, he received information from an informer that the appellant was involved in the robberies, the subject of this appeal. He arrested the appellant and took him to Rumuruti Police Station where the appellant was detained. PW7 PC Lawrence Mihasi was the investigating officer of this case. He testified that he investigated the case and after compiling all the evidence, arrived at the decision to charge the appellant with the offences which he was convicted. He however testified that the appellant was not found with any item which connected him to the said robberies.

When the appellant was put on his defence, he denied that he had participated in the robberies in question. Other than narrating the circumstances of his arrest, he testified that the identification parade which was conducted by the police was improperly conducted because the witnesses had seen him before the said identification parade took place.

This being a first appeal, we are required in law to subject the evidence adduced before the trial magistrate to in-depth scrutiny and re-evaluation so as to arrive at the independent determination whether or not to uphold the conviction of the appellant by the trial magistrate. In reaching our decision, we are required to always put in mind the fact that we neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment as regard the demeanor of witnesses (*See* Njoroge vs Republic [1987] KLR 19). The issue for determination by this court in this appeal is whether the prosecution had adduced sufficient evidence to sustain the conviction of the appellant on the charges of robbery with violence brought against him. We have considered the submissions made before us by the appellant and by Mr. Koech on behalf of the State. We have also carefully re-evaluated the evidence that was adduced by the prosecution witnesses before the trial magistrate's court.

In this appeal, there is no doubt that the prosecution relied on the sole evidence of identification to secure

the conviction of the appellant. The complainants in this case testified that they were able to identify the appellant in the gang of robbers of about five to eight members. All the complainants who identified the appellant testified that they had not seen the appellant before the robbery incidents. PW1 testified that, although the robbery took place for between 7-10 minutes, he was able to identify the appellant. He testified that the robbery had taken place at around 4.00 p.m. On the other hand, PW2 and PW4 testified that, although the robbery took place at about 7.00 p.m., it was not yet too dark to prevent them from identifying the appellant among the gang of robbers.

It is apparent from the evidence adduced by the said complainants that no first report of the description of the robbers was made to the police. In cases relying solely on the evidence of identification, it is imperative that the description of the offender made by the victim during the first report to the police be recorded and later produced in evidence. It is on the basis of this first report that an identification parade can later be conducted. The complainants did not tell the court how they were able to be positive that it was the appellant who was among the robbers yet they did not give his physical description or the clothes that he wore on that day.

As was held by the Court of Appeal in Peter Kimaru Maina vs Republic CA Criminal Appeal No.111 of 2003 (Nyeri) (*unreported*) at page 3 of its judgment;

"*Before the court can base a conviction on the evidence of identification at night, such evidence should be absolutely water tight – R vs Eria Sebwato [1969] E.A 174; Kiarie vs Republic [1984] KLR 739. Further, visual identification must be treated with greatest care and ordinarily a dock identification alone should not be accepted unless the witness had in advance given description of the assailant and identified the suspect on a properly conducted parade. Amolo vs Republic [1988–1993] 2 KAR 254."*

The Court of Appeal further held in Wilson Kamuri Ndirangu vs Republic CA Criminal Appeal No.88 of 1999 (Nakuru) (*Unreported*) at page 7 of its judgment;

"*Furthermore, as argued before us by Mr. Karanja, the moments must have been stressful for the witness, who was faced with a gang armed with a pistol and being threatened with death. We agree with Mr. Karanja and as was held by this court in Patrick Nasibwa vs Republic, Criminal Appeal No.80 of 1997 (Unreported)*

'This case reveals the problem caused by visual identification of suspects. This mode of identification is unreliable for the following reasons which are discussed in the BLACKSTONE'S CRIMINAL PRACTICE 1997, Section F18

(a) Some people may have difficulty in distinguishing between different persons of only moderately similar appearance, and many witnesses to crimes are able to see the perpetrators only fleetingly, often in very stressful circumstances;

(b) Visual memory may fail with the passage of time; and

(c) As in the process of unconscious transference, a witness may confuse a face he recognized from the scene of the crime (it may be of an innocent person) with that of the offender."

In the present appeal, the police identification parade was held three years after the said robbery. In the absence of a description being given to the police when the first report was made after the robbery had taken place, it would be impossible for an independent tribunal evaluating the evidence to arrive at a determination that the complainants had in fact made a positive identification of the appellant which identification was confirmed when they identified the appellant in an identification parade conducted by the police.

In the circumstances of this case, this court cannot rule out the possibility that the complainants were exposed to the appellant before the said identification parade was conducted. We are not therefore able to state without any shadow of doubt that the complainants identified the appellant. We are of the view that

the circumstances of the robbery were such that it cannot be ruled out that the complainants could have been mistaken in their identification of the appellant. Another piece of evidence that lends credence to our finding, is the evidence of PW7 *(the investigating officer*) who testified that the complainants had mentioned to him the name of the appellant as being among the people who robbed them.

In their evidence before court, the complainants denied having known the appellant before the robbery incident. They could not therefore have known his name to enable them reveal the same to the police. The appellant was arrested based on information given to the administration police by an informer. The informer had informed the administration police that the appellant had sustained a gun shot wound on his hand. There is no evidence however, from the testimony of the prosecution witnesses, that any of the robbers was shot during the said robbery.

The upshot of the above analysis is that the submission by the appellant that he was not properly identified by the complainants in this appeal could well be true. The submission by the appellant raises reasonable doubt that the complainants identified him during the robberies. Nothing that could connect the appellant with the said robberies was found in his possession. The evidence of identification was not therefore watertight. The police identification parade conducted three years after the robbery incident does not constitute corroboration of the identification during the robbery that was made by the complainants.

It is clear that this appeal shall be allowed. The conviction of the appellant on all the counts of Robbery with Violence contrary to Section 296(2) of the Penal Code are hereby quashed. The death sentence imposed is hereby set aside. The appellant is ordered set at liberty and released from prison unless otherwise lawfully held.

DATED at NAKURU this 14th day of November 2006

M. KOOME

JUDGE

L. KIMARU

JUDGE